STATE OF MICHIGAN

COURT OF APPEALS

LISA TUZAS,

Plaintiff-Appellant,

v

CRACKER BARREL OLD COUNTRY STORE OF MICHIGAN,

Defendant-Appellee.

UNPUBLISHED
December 14, 2010

No. 293981
Saginaw Circuit Court
LC No. 08-002064-CD

Before: MURPHY, C.J., and METER and GLEICHER, JJ.

PER CURIAM.

In this employment discrimination and retaliatory discharge action, plaintiff Lisa Tuzas appeals as of right a circuit court order granting summary disposition to defendant Cracker Barrel Old Country Store of Michigan. We affirm.

Tuzas worked as a server at the Cracker Barrel restaurant in Bridgeport. On October 23, 2007, Tuzas and Thomas Sells, a coemployee, engaged in a verbal altercation. At her deposition, Tuzas recounted that Sells screamed at her, used profanity, and called her vulgar names. Tuzas asserted that she "walked away from him," but Sells followed her and continued to use sexually insulting language. Sells claimed that Tuzas referred to him as a "faggot" and threatened that her son would come to the restaurant and assault him. James Buckey, Cracker Barrel's associate manager, attempted to defuse the situation by calling the combatants into his office. According to Buckey, Tuzas and Sells continued to scream at each other, despite his efforts to calm them. After the incident, Buckey gathered statements from Tuzas, Sells, and two other employees. Tuzas's statement described the confrontation in Buckey's office as follows:

> When I got there, [Sells] wouldn't let me … answer . . . Buckey's question. He was two inches from my face screaming so loud he was spitting in my face.
>
> I told him to get out of my face. And he said what are you going to do—what are you going to do about it.
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> And I said to shut up. I am talking to Buckey. He continued to scream in my face. I told him to back up and get out of my face, or he would regret it. I'd call Corporate. And he said fuck you, bitch. I don't care. They can't touch me.

* * *

I told Buckey I am done. I am calling Corporate. And I walked away.

The day after the incident, Tuzas called Cracker Barrel's corporate headquarters and advised that she intended to pursue a sexual harassment claim.

On October 29, 2007, Cracker Barrel terminated both Sells and Tuzas. Cracker Barrel's written notice of termination explained that the company was firing Tuzas for violating policies prohibiting the use of profanity, and for engaging in conduct unbecoming to the company image. In July 2008, Tuzas filed in the Saginaw Circuit Court a complaint setting forth claims for retaliation in violation of the Civil Rights Act (CRA), MCL 37.2101 *et seq*., and racial discrimination in violation of the CRA.[1] In March 2009, Cracker Barrel filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). The motion asserted that (1) Tuzas presented no evidence of race discrimination, (2) Tuzas could not show that she had engaged in a protected activity under the CRA, and therefore could not prove a prima facie case of retaliatory discharge, and (3) Tuzas failed to produce evidence that Cracker Barrel had terminated her as a result of her engagement in any protected activity. In a written opinion and order, the circuit court granted Cracker Barrel's motion for summary disposition, ruling that Tuzas did not establish a prima facie case of racial discrimination, and that she "failed to sufficiently establish her prima facie case of unlawful retaliation." The circuit court found that because Tuzas "is unable to show she filed a sexual harassment claim," she could not demonstrate that she had engaged in an activity protected under the CRA. The circuit court further reasoned:

> But even if Plaintiff could establish that she was involved in the protected activity of filing a sexual harassment claim, the Court finds that Plaintiff still has not met the burden of establishing her prima facie case. [*Deflaviis v Lord & Taylor, Inc*, 223 Mich App 432; 566 NW2d 661 (1997),] further requires that Plaintiff establish that there was a causal connection between the protected activity and the adverse employment action. Plaintiff cannot point to any evidence that shows that she was terminated because of filing a sexual harassment complaint. Plaintiff was fired for "Poor Service to Guest/Coworker" and for threatening a coworker.

Tuzas challenges on appeal only the circuit court's dismissal of her retaliatory discharge claim. We review de novo a circuit court's summary disposition ruling. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005).[2] A motion brought pursuant to MCR

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[1] Regarding the race discrimination claim, Tuzas's complaint averred that she "was treated differently than similarly situated African American employees when she was discharged from employment, when similarly situated African American employees committing the same acts were not disciplined or discharged."

[2] Cracker Barrel moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). The circuit court did not specify under which subrule it found summary disposition appropriate, but

2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183.

Tuzas first challenges the circuit court's ruling that her neglect to file a formal sexual harassment claim precluded her action for retaliatory discharge. In relevant part, the CRA proscribes "[r]etaliat[ion] or discriminat[ion] against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act." MCL 37.2701(a). To establish a prima facie case of retaliation under the CRA, a plaintiff must show "(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 273; 696 NW2d 646, amended 473 Mich 1205 (2005) (internal quotation omitted).

Tuzas submitted sufficient evidence to establish that she engaged in a "protected activity" under the CRA. During the confrontation in Buckey's office, Tuzas threatened to "call[] Corporate." The next day, Tuzas telephoned Cracker Barrel's district manager and informed him that she intended to file a sexual harassment complaint. In the written statement Tuzas gave to Buckey, she stated, "I told corporate I want to file a sexual harassment complaint." An employee need only raise "the spectre of a discrimination complaint" to invoke the protection of the act. *McLemore v Detroit Receiving Hosp & Univ Medical Ctr*, 196 Mich App 391, 396; 493 NW2d 441 (1992). Accordingly, Tuzas introduced evidence giving rise to a genuine issue of material fact regarding her engagement in a "protected activity" under the CRA.

Nevertheless, we conclude that Tuzas failed to establish any connection between her threatened sexual harassment complaint and Cracker Barrel's termination decision. "To establish causation, the plaintiff must show that his participation in [an] activity protected by the [CRA] was a 'significant factor' in the employer's adverse employment action, not just that there was a causal link between the two." *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001). "A causal connection can be established through circumstantial evidence, such as close temporal proximity between the protected activity and adverse actions, as long as the evidence would enable a reasonable factfinder to infer that an action had a discriminatory or retaliatory basis." *Rymal v Baergen*, 262 Mich App 274, 303; 686 NW2d 241

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because the parties plainly referenced documentary evidence beyond the pleadings as relevant to Tuzas's claims, subrule (C)(10) governs our analysis. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

(2004). However, "a temporal relationship, standing alone, does not demonstrate a causal connection between the protected activity and any adverse employment action. Something more than a temporal connection between protected conduct and an adverse employment action is required to show causation where discrimination-based retaliation is claimed." *West*, 469 Mich at 186.

We need not specifically decide whether Tuzas sufficiently made a causal connection between her termination and her threatened discrimination claim, because we find that Tuzas did not rebut the legitimate, nondiscriminatory reasons proffered in support of her termination. After presenting a prima facie case of discrimination under the CRA, the plaintiff must nevertheless "proceed through the familiar steps set forth in *McDonnell Douglas* [*Corp v Green*, 411 US 792, 802-803; 93 S Ct 1817; 36 L Ed 2d 668 (1973).]" *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). "[O]nce a plaintiff establishes a prima facie case of discrimination, the defendant has the opportunity to articulate a legitimate, nondiscriminatory reason for its employment decision in an effort to rebut the presumption created by the plaintiff's prima facie case." *Id*. at 464. If the defendant produces a legitimate, nondiscriminatory reason for its action, "the plaintiff must demonstrate that the evidence in the case, when construed in the plaintiff's favor, is 'sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff.'" *Id*. at 465, quoting *Lytle v Malady (On Rehearing)*, 458 Mich 153, 176; 579 NW2d 906 (1998). A plaintiff can establish pretext by substantiating that the proffered reasons for the adverse employment action (1) had no basis in fact, (2) were not the actual factors motivating the decision, or (3) were insufficient to justify the decision. *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990).

Cracker Barrel introduced evidence tending to prove that it fired Tuzas because she used profanity and threatened a coworker. An eyewitness to Tuzas's confrontation with Sells recalled that she called Sells a "faggot" and threatened to have him beaten. Buckey's general manager testified that she submitted Buckey's investigation materials to Cracker Barrel's employee relations department, which recommended termination of both Tuzas and Sells. Cracker Barrel additionally presented evidence that Tuzas's conduct violated company policy. Cracker Barrel's advancement of these legitimate, nondiscriminatory reasons for terminating Tuzas's employment shifted to her the burden to articulate evidence that, when viewed in the light most favorable to her, would permit a reasonable fact finder to conclude that Cracker Barrel's proffered reasons for its decision amounted to pretexts. *Texas Dep't of Community Affairs v Burdine*, 450 US 248, 253; 101 S Ct 1089; 67 L Ed 2d 207 (1981). Although Tuzas theorizes that Cracker Barrel fired her because the company "was more concerned with protecting [it]self than addressing or resolving her sexual harassment complaint," our review of the record in the light most favorable to Tuzas leads us to conclude that she simply has presented no evidence from which a fact finder could reasonably conclude that Cracker Barrel's articulated reasons for her termination constituted pretexts. For example, Tuzas has put forward no evidence that Cracker Barrel's justifications lacked a factual basis, insufficiently explained her discharge, or were not the actual reasons motivating her termination. In light of our inability to infer any indicia of pretext flowing from Cracker Barrel's employment decision, we conclude that the circuit court properly granted Cracker Barrel summary disposition of Tuzas's retaliation claim.

Tuzas finally suggests that significant credibility issues precluded summary disposition. As a primary example, Tuzas points to the questionable nature of Buckey's testimony about her threat to assault Sells, given that Buckey had failed to reference this threat in the first of his written reports documenting the incident. A court "is not permitted to assess credibility, or to determine facts on a motion for summary judgment." *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). In evaluating the record evidence, we have endeavored to view the evidence in the light most favorable to Tuzas to ascertain whether she produced sufficient evidence to enable a reasonable jury to conclude that Cracker Barrel's expressed reasons for her termination were pretextual. Furthermore, even disregarding Buckey's testimony in its entirety, a separate eyewitness documented that Tuzas had threatened Sells, and an employee senior to Buckey reviewed the witness statements and recommended Tuzas's termination. In summary, we discern no credibility questions that preclude summary disposition in this case.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher